SUPREME COURT, U. S.

FILED

OCT 19 1961

JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 365

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. JUNKERMAN
Counsel for Respondent
80 Broad Street
New York 4, N. Y.

INDEX

PAGE

Statement 1

The Prior Opinions 2

The Decision Below Is Clearly Correct 7

There Is No Important Question of Federal Law Involved 10

Conclusion 13

TABLE OF CASES

American Surety Company of New York v. *Gosnell*, 219 F.2d 111 (2 Cir. 1955) 3n

Atlantic Coast Line R.R. v. *Phillips*, 332 U.S. 168 (1947) 11

Bournias v. *Atlantic Maritime Co.*, 220 F.2d 152 (2 Cir. 1955) 4n

Canadian Northern Ry. v. *Eggen*, 252 U.S. 553 (1920) 5n, 11, 12

Caraway v. *Burns*, 143 Cal.App. 2d 327, 299 P.2d 689 (1956) 3n

Clyde v. *Gilchrist*, 262 U.S. 94 (1923) 11

Gates v. *Wendling Nathan Co.*, 27 Cal.App.2d 307, 81 P.2d 173 (1938) 6n

Guaranty Trust Co. v. *York*, 326 U.S. 97 (1945) 10, 11, 11n

Haro v. *Southern P. R. Co.*, 17 Cal.App.2d 594, 62 P.2d 441 (1936) 3n, 4n, 5, 5n, 6, 6n, 7, 8

PAGE

Klotz v. *Angle*, 220 N.Y. 317, 116 N.E. 24 (1917) 11

Leeper v. *Beltrami*, 53 Cal.2d 195, 347 P.2d 12 (1959) 5, 6, 6n, 7, 8, 8n

Magee v. *McNamara*, 10 F.R.D. 5 (W.D.Pa. 1950) 10n

Marsteller v. *McClean*, 7 Cranch 156, 11 U.S. 98 (1812) 9

Regan v. *Merchants Transfer Co.*, 337 U.S. 530 (1949) 10

Robertson v. *Burrell*, 119 Cal. 568, 42 Pac. 1085 (1895) 7n

Salmon v. *Rathbone*, 152 Cal. 290, 92 Pac. 733 (1907) 9n

Sears v. *Majors*, 104 Cal.App. 60, 285 Pac. 321 (1930) 4n, 5, 5n, 6, 6n, 7, 8, 9

Vance v. *Vance*, 108 U.S. 514 (1883) 12

CONSTITUTION

United States Constitution, Article IV, 2 ..... 4n, 11

STATUTES

California Civil Code, §25 ..... 3n

California Code of Civil Procedure, §340 ..... 2, 2n

California Code of Civil Procedure, §352 ..... 3n

California Code of Civil Procedure, §377 ..... 2, 2n, 5

New York Civil Practice Act, §13 ..... 3n, 11, 12

New York Civil Practice Act, §§201-206 ..... 5n, 12n

PAGE

New York Code of Civil Procedure, §390a 11

South Carolina Code, Vol. 1, §10-104(1) 10n

RULE

Federal Rules of Civil Procedure, Rule 17(b) .. 10

AUTHORITY

Freeman on Cotenancy, Sec. 376 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 365

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioners, plaintiffs below, for the second time seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York granting summary judgment to defendant.

The action was brought to recover damages for the alleged wrongful death of Jasper Wallace Hall, plaintiffs' decedent, who died in an airplane accident in

the vicinity of Alvarado, California, on March 20, 1953. The flight was for the purpose of transporting military personnel from New Mexico to California on a plane operated by the defendant under contract to the United States Government. The decedent's wife and child were residents of the state of South Carolina at the time of his death. Plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as guardian *ad litem* of her minor child. Jurisdiction was predicated upon diversity of citizenship. Defendant's motion for summary judgment was based upon the ground that the action was barred by the California one-year limitation period controlling wrongful death actions, Cal. Code Civ. Proc. § 340, and the fact that under California law a married woman reaches her majority at the age of eighteen. The widow in the case at bar reached the age of eighteen on November 17, 1954. This action was not commenced within one year thereafter; in fact, not until November 7, 1958.

The Prior Opinions

The opinion of the district court (R. 33-39) is reported at 173 F.Supp. 114, and may be summarized as follows:

The California Wrongful Death Statute[1] allows suits by the heirs or personal representatives of decedent and, under California law, such an action must be commenced within one year from the decedent's death.[2] The statute is tolled during the minority of

[1] Cal. Code Civ. Proc. § 377.

[2] Cal. Code Civ. Proc. § 340-3.

the person entitled to sue.[3] However, a woman who has contracted a lawful marriage and thereafter reaches the age of eighteen years attains her majority upon reaching that age.[4] The one-year California statute is clearly applicable here by reason of the New York "borrowing statute"[5] and must be applied with all its accouterments, including its tolling provisions and its rules on infancy.[6] Thus, if the action would be time-barred in California, where the cause of action arose, it is time-barred in New York as well. Under California law, an action on behalf of a widow for the wrongful death of her husband must be commenced within one year after attaining her majority[7] and an action which is time-barred as to the widow is

---

[3] Cal. Code Civ. Proc. § 352.

[4] Cal. Civ. Code § 25. Due to an apparent typographical error, this statute is incorrectly set out at page 7 of the petition. Section 25 of the California Civil Code, as it read on March 20, 1953, provided in pertinent part as follows:

> "Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of the code on marriage and shall not be construed as repealing, or limiting the provisions of Section 204 of this code; provided further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, the same as if she was 21 years of age. * * *"

The phrase "transaction respecting property" includes within its definition the bringing of an action by a widow for the wrongful death of her husband. *Haro* v. *Southern P. R. Co.*, 17 Cal. App. 2d 594, 62 P.2d 441 (1936).

[5] N. Y. Civ. Prac. Act § 13.

[6] *American Surety Company of New York* v. *Gainfort*, 219 F.2d 111, 112 (2 Cir. 1955).

[7] *Haro* v. *Southern P. R. Co.*, 17 Cal. App. 2d 594, 62 P.2d 441 (1936); *Caraway* v. *Burns*, 143 Cal. App. 2d 327, 299 P.2d 689 (1956).

also time barred as to infant offspring of the decedent.[8] It is clear therefore, that under California law, the widow attained her majority on November 17, 1954, when she became 18, and that her cause of action and that of the infant daughter were time barred on November 17, 1955.

The opinion of the Court of Appeals, affirming the judgment of the district court (R. 42-50), is reported at 276 F.2d 280, and may be summarized as follows:

Although petitioners had not argued otherwise, the policy embodied in New York's "borrowing statute" against opening its courts to suits by non-residents on foreign causes of action that were time-barred in the state creating them, is not overcome by the appointment of a resident of New York as administrator of a non-resident's estate, and the administrator is subject to the California statute of limitations as the widow and child clearly are. When the California legislature considered that its brides of eighteen had sufficient responsibility to conduct suits in California on their own accounts, it would hardly demand a greater age of a South Carolina bride to do the same, and this is preeminently a case where California would desire to apply to all suitors the law of the forum.[9] This application of New York's "borrowing statute" does not abridge the widow's privileges and immunities in violation of the Constitution,[10] since she could have maintained an action in New York at any time by a

---

[8] *Haro* v. *Southern P. R. Co.*, 17 Cal. App. 2d 594, 62 P.2d 441 (1936); *Sears* v. *Majors*, 104 Cal. App. 60, 285 Pac. 321 (1930).

[9] *Bournias* v. *Atlantic Maritime Co.*, 220 F.2d 152, 154 (2 Cir. 1955).

[10] Constitution, Article IV, § 2.

guardian *ad litem*,[11] and the constitutional requirement is satisfied "if the nonresident is given access to the courts of the state upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."[12] With respect to the cause of action asserted on behalf of the minor daughter, the barrier lies in the California rule that a single joint cause of action is created by the California Wrongful Death Statute and that if limitation has barred the action as to an adult parent, the action is also barred as to a minor infant.[13] The district court "was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be inconsistent with but in no way reflect on the pertinent authorities."[14]

The opinion of this Court, reported at 365 U.S. 293, remanded the case to the Court of Appeals to "decide what relative weights, as authoritative sources for ascertaining California law, the New York Court of Appeals would accord to the *Sears-Haro* line (direct holdings of [California] District Courts of Appeal between 1930 and 1938) and to *Looper* (a considered, relevant dictum of general scope by the California

---

[11] N. Y. Civ. Prac. Act, §§ 201-206.

[12] *Canadian Northern Ry.* v. *Eggen*, 252 U.S. 553, 562 (1920).

[13] *Sears* v. *Majors*, 104 Cal. App. 60, 285 Pac. 321 (1930); *Haro* v. *Southern P. R. Co.*, 17 Cal. App. 2d 594, 62 P.2d 441 (1936).

[14] 276 F.2d 280, 286.

Supreme Court in 1959)",[15] decided after the order granting summary judgment and only shortly before argument in the Court of Appeals. It was not called to the attention of, nor considered by, the Second Circuit at that time.

The Court of Appeals upon remand (Pet. 19-26), 290 F.2d 904, adhered to its prior affirmance of the order of the district court granting summary judgment. Its opinion may be summarized as follows:

Looper was an action by a husband and wife for recovery of moneys paid under duress while the husband was serving a prison term. The action was filed two years after his release from prison and four years after the cause of action arose; a three year statute of limitations for actions for relief on the ground of fraud was held to be applicable. The Supreme Court of California decided that because of the husband's disability, his claim was not time-barred. As to the wife's claim, that court said "If the cause of action were a joint one, the statute would be tolled as to both," but went on to hold the claim was not joint and the wife was time-barred. The *Sears-Haro* line of intermediate California appellate court decisions was not referred to by the California Supreme Court in *Looper*; neither did the Supreme Court of Cali-

[15] 365 U.S. 293, 295-296. In addition to *Sears and Haro*, this Court also referred to *Gates v. Wendling Nathan Co.*, 27 Cal. App. 2d 307, 81 P.2d 173 (1938). The dictum referred to is found in *Looper v. Beltrami*, 53 Cal. 2d 195, 347 P.2d 12 (1959), and reads as follows (pp. 208-209):

> "If the cause of action were a joint one, the statute would be tolled as to both. 'If an action not severable is not barred as to one of the parties on account of his infancy at the time the cause of action arose, it is not barred as to either of the other parties.' II Wood on Limitations (4th Ed. 1916) 1079."

fornia refer in *Leeper* to its own decision,[16] on which the lower court had relied in deciding *Sears*. In selecting a one year limitation for wrongful death actions, the California legislature must have known that instances of the wrongful death of the parent of a young child were not uncommon, and it is hard to see why it should have wished to allow the period of limitations in such cases to be prolonged up to a score of years when there was in existence a person able to sue for the benefit of all. Any one of the joint claimants could sue and have those under a disability named as defendants, with their rights in the single award to be determined by the court. Where the case for starting the running of the statute is so strong and the consequences of an opposite rule so contrary to apparent legislative policy, the Court of Appeals "cannot believe the Supreme Court of California meant to overturn, without citation, an unbroken line of decisions of intermediate appellate courts, of thirty years' standing, consistent with that policy;" nor does the Court of Appeals believe that the New York Court of Appeals "could believe it."[17]

The Decision Below Is Clearly Correct

As this Court recognized when this case was before it on the merits, the *Sears-Haro* line of cases are direct holdings of the California District Courts of Appeal that where one beneficiary of a wrongful death claim is time-barred, all beneficiaries are time-barred, the cause of action being "joint". Petitioners now seek to avoid the operation of this rule by urging (1) that the Court of Appeals has not provided an au-

[16] *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086 (1895).

[17] 290 F.2d 904, 907-8.

thoritative answer to this Court's question with respect to the dictum in the *Leeper* case, (2) that the authorities upon which the *Sears* case was based do not support the holding in that case, and (3) that the fact situation in this case is different from that in *Sears*.

Petitioners' argument with respect to the *Leeper* case is nothing more than a play on words. The Court of Appeals not only thoroughly examined *Leeper*,[18] but the apparent legislative policy of California as well, in arriving at the conclusion that the dictum in the *Leeper* case was not meant to overturn the direct holdings of the *Sears-Haro* line of cases.

Great stress is placed by petitioners upon what they claim to be a partial or total failure of the authorities cited in the *Sears* case to support the holding of that case. However, the language of the court in *Sears* is unambiguous and concise. The court said (104 Cal. App. 60, 62): "Continuing, they claim that the action being barred as to all excepting the infant, that it was also barred as to him. We think the contention is well founded." Regardless of whether this holding is fully supported by all the authorities cited, certainly the courts below were not free to ignore the clear meaning of that decision and those that followed it.

Petitioners further argue that the fact situation in this case is different from that in *Sears*, in that in the present case both the widow and child were under dis-

[18] Copies of the briefs and documents submitted to the California Supreme Court and the District Court of Appeal, State of California, Third Appellate District in the case of *Leeper* v. *Beltrami*, 53 Cal. 2d 195, 347 P.2d 12, were lodged with the Court of Appeals and are referred to in its opinion 290 F.2d 904, 906-7.

abilities when the cause of action accrued, whereas in *Sears* and the cases that followed it, the widow had been under no disability.[19] They then describe as a "rule" that if all persons entitled to sue when the joint cause of action accrues are under a disability, the statute will not begin to run until the disability is removed from all. However, their authority, Sec. 376 of Freeman on Cotenancy, merely describes this as a "distinction * * * allowed in several state courts," not citing any California cases, and not as a "rule". On the contrary, in the absence of an express holding by the California courts, the true rule would appear to be that stated by Story, J., in *Marsteller* v. *McClean*, 7 Cranch 156, 11 U.S. 98 (1812), as follows (p. 159):

> "When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action."

Finally, it should be pointed out that the emotional appeal, contained at page 18 of the petition, is replete with inaccuracies. The infant daughter acquired no "separate and independent statutory rights," since the statute gives a "single joint cause of action" to the heirs.[20] Moreover, it is not undisputed that the infant daughter could not have been "deprived of these rights had she sued as the sole plaintiff." All the Court of Appeals said was that if the cause of action asserted on behalf of the minor daughter "stood alone", neither the California nor New York statute

---

[19] This is contrary to petitioners' prior arguments to this Court. In both their prior petition (p. 10) and their brief on the merits (p. 22), they stated that "The precise issue involved herein did not come before a California court until 1930, in *Sears* v. *Majors*, 104 Cal. App. 60, 285 Pac. 321."

[20] *Salmon* v. *Rathjens*, 152 Cal. 290, 294; 92 Pac. 733 (1907).

of limitations would be an obstacle. That cause of action could "stand alone" only if she were the sole heir of the decedent.

There Is No Important Question of Federal Law Involved

It is difficult to perceive what bearing Rule 17(b) of the Federal Rules of Civil Procedure, which speaks of capacity to sue or be sued, has on this case. The applicability of the Federal rules cannot be considered in a vacuum and can have no effect until an action is commenced in the federal court. There is no dispute here that the widow was over the age of twenty-one years and thus had "capacity to sue" under the law of her domicile[21] when the action was commenced. The issue here has to do with the law which a California court would apply in deciding when the widow first became entitled to sue in California in her own right and, consequently, the period during which a cause of action governed by the laws of California is to remain alive. Petitioners are confused between "legal capacity to sue" and possession of a "cause of action."[22]

Moreover, in view of this Court's decisions in *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530 (1949), and *Guaranty Trust Co.* v. *York*, 326 U.S. 97 (1945), it is abundantly clear that Rule 17(b) has no application to the issues involved here. In *Ragan*, this Court held that the Federal Rules of Civil Procedure could

---

[21] South Carolina Code, Vol. 1, §10-104(1).

[22] "The law recognizes 'capacity to sue' as the plaintiff's personal right to come into court, and his 'cause of action' as his right to relief under the facts of the case he brings." *Magee* v. *McNany*, 10 F.R.D. 5, 7 (W.D. Pa. 1950).

not in effect extend a state statute of limitations in a diversity case when the statute had run according to applicable state procedure, and in the *Guaranty Trust Co.*, case it was held that particular rules of local law "do not in the slightest change the crucial consideration, that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery."[23] Neither the determination of a question of state law by a federal court in a diversity action, nor the harshness of the result in a particular case creates an important question of federal law.

Petitioners' contention that the construction given to Section 13 of the New York Civil Practice Act by the courts below violates the privileges and immunities clause of the Constitution, is invalid. This Court has said that in dealing with matters of local policy it will be slow to depart from local judgment in the absence of clear and compelling evidence of unconstitutionality. *Clyde* v. *Gilchrist*, 262 U.S. 94 (1923); *Atlantic Coast Line R. R.* v. *Phillips*, 332 U.S. 168 (1947). And the constitutionality of Section 13 (then Section 390a of the Code of Civil Procedure) has been upheld in *Klotz* v. *Anglo*, 220 N.Y. 347, 116 N.E. 24 (1917), where the New York Court of Appeals considered the question of the discrimination of the state against a non-resident and held such discrimination was not unconstitutional.

The constitutionality of a Minnesota statute substantially similar to Section 13 was upheld by this Court in *Canadian Northern Ry.* v. *Eggen*, 252 U.S. 553 (1920). In that case it was stated that the "privi-

[23] 326 U.S. 99, 110.

leges and immunities" clause is satisfied (p. 562): "if the non-resident is given access to the court of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." Here, the widow could have enforced any rights she may have had under California law in the courts of New York by a guardian *ad litem*.[24] This Court long ago stated that there is no inherent right in an individual to have a statute of limitations tolled during infancy, *Vance* v. *Vance*, 108 U.S. 514 (1883).

The discrimination which results from Section 13 is not due to a policy of "creating an arbitrary or vexatious discrimination" against non-residents of New York, a policy consideration which this Court found important in *Canadian Northern Ry.* v. *Eggen*, *supra*. The statute is an attempt by New York to prevent forum shopping whereby a litigant who has failed to prosecute his rights within the period prescribed by the statute of limitations where the cause of action arose searches out other jurisdictions where more favorable treatment is available. The policy considerations which the legislature of New York found compelling in passing a statute which closed the courts of New York to non-residents who failed to prosecute their action within the time specified by the jurisdiction which created the cause of action should not be ignored in this instance.

---

[24] N. Y. Civ. Prac. Act, §§ 201-206.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM J. JUNKERMAN
Counsel for Respondent

JAMES B. MCQUILLAN
Of Counsel